

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TERRENCE LAMARR JENNINGS,

Defendant-Appellee.

UNPUBLISHED

September 13, 2002

No. 230650

Oakland Circuit Court

LC No. 00-171157-FC

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83, possession of a firearm by a felon, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The prosecutor appeals as of right from the trial court's order dismissing the charges against defendant. We reverse.

The trial court dismissed the charges against defendant because the complaining witness did not appear for trial after repeated attempts by the prosecutor and the court to secure her presence. The dismissal occurred despite the prosecutor's willingness to proceed with the case on alternative proofs.

The prosecutor contends that the trial court erred in dismissing the case because in doing so, it violated the separation of powers doctrine. "This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). However, to the extent that a constitutional issue regarding the separation of powers doctrine has been implicated, our review is de novo. See generally *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

The separation of powers doctrine provides the following:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, art 3, § 2; see also *People v Conat*, 238 Mich App 134, 146; 605 NW2d 49 (1999).]

In *People v Williams*, 244 Mich App 249, 252-253; 625 NW2d 132 (2001), this Court stated that “[t]he authority to prosecute for violation of [offenses against the state] is vested solely and exclusively with the prosecuting attorney.” “[T]he trial court’s authority over the discharge of the prosecutor’s duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal or ultra vires.” *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995).

In *Morrow*, *supra* at 163-164, this Court noted that while testimony from the complaining witness is certainly helpful to the prosecutor, her absence at trial does not mean the case against the defendant should be dismissed. The Court stated that

the trial court exceeded its authority when it dismissed the information against defendant at the pretrial stage of the proceedings because the decision whether to dismiss a case or proceed to trial is with the prosecutor’s sole discretion. [*Id.* at 165.]

In *Williams*, the victim failed to appear for trial, despite having been subpoenaed. *Id.* at 251. The trial court concluded that the victim did not want to prosecute the defendant, found that the offense was a private crime rather than a public crime, and dismissed the charges against the defendant. *Id.* This Court, finding a violation of the separation of powers doctrine and noting the *Morrow* decision, reversed the trial court’s decision and remanded the case for reinstatement of the charges. *Id.* at 251-252.

In the present case, although the witness failed to appear for trial twice, the prosecutor asserted each time that she was prepared to proceed to trial on alternate proofs, consisting of excited utterance testimony, a 911 tape, and an alleged confession. It is the prosecutor’s ultimate decision whether to proceed with the prosecution. *Id.* at 252; *Morrow*, *supra* at 165. Moreover, the trial court is not in a position to determine the sufficiency of the evidence before the presentation of the prosecutor’s case in chief. Accordingly, we conclude that the trial court erred in dismissing this case.

The prosecutor further contends that this case should be remanded for continued proceedings before a different judge. We find that remand before a different judge is not necessary. The prosecutor has not demonstrated, nor does the record support, a finding of actual bias or prejudice against the prosecution. See *People v Fox (After Remand)*, 232 Mich App 541, 559; 591 NW2d 384 (1998).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter